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Supreme Court of the United States

OCTOBER TERM, 1951

No. 493

ISBRANDTSEN COMPANY, INC., PETITIONER,

vs.

MATTHEW JOHNSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR CERTIORARI FILED DECEMBER 26, 1951

CERTIORARI GRANTED MARCH 3, 1952



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Appendix.

RELEVANT DOCKET ENTRIES.

Oct. 27, 1948.	Libel filed.
Oct. 27, 1948.	Citation exit—returnable November 12, 1948.
Nov. 18, 1948.	Citation returned—"on October 29, 1948 served" and filed.
Nov. 18, 1948.	Answer filed.
Dec. 16, 1948.	Order to place case on the Trial List, filed.
Jan. 25, 1949.	Respondent's answers to interrogatories, filed.
July 18, 1949.	Respondent's notice of taking deposition of Libellant, filed.
July 18, 1949.	Respondent's Interrogatory to Libellant, filed.
Jan. 16, 1950.	Respondent's Notice of taking deposition of Walter R. Herron, filed.
Jan. 18, 1950.	Respondent's supplemental answer to interrogatories, filed.
Jan. 26, 1950.	Trial (Kirkpatrick, J.) Witnesses sworn. C. A. V.
Jan 26, 1950.	Stipulation of counsel amending complaint and answer, filed.
Jan. 26, 1950.	Stipulation of counsel as to certain facts, filed.
Feb. 10, 1950.	Deposition of Walter R. Herron, filed.
Mar. 27, 1950.	Argued sur pleadings and proofs. C. A. V.
May 19, 1950.	Opinion, Kirkpatrick, J., awarding libellant wages, interest, costs and transportation, filed.

June 21, 1950. Final Decree in favor of libellant in $573.55 with interest at 6% from June 3, 1948 and costs, filed.

Aug. 28, 1950. Libellant's bill of costs, filed.

Sept. 19, 1950. Respondent's notice of appeal, filed.

Sept. 19, 1950. Copy of Clerk's Notice to United States Court of Appeals, filed.

LIBEL IN PERSONAM.

INTERROGATORIES.

To the Honorable, the Judges of the Said Court:

The libel and complaint of MATHEW JOHNSON against ISBRANDTSEN COMPANY, INCORPORATED, in a cause of action, civil and maritime, respectfully represent:

1. Libellant is a seaman in the United States Merchant Marine.

2. Respondent is a corporation duly organized and existing under and by virtue of the laws of the State of New York.

3. Libellant, upon information and belief, avers that, at all times hereinafter mentioned, respondent possessed, operated, managed and controlled the S. S. "Stephen W. Kearney", in foreign commerce.

4. On or about the 3rd day of February, 1948, libellant entered the employ of respondent as a member of the crew of the S. S. "Stephen W. Kearney", in the capacity of Messman, at the rate of $166.95 per month, plus overtime and found, under foreign shipping articles, for a period not exceeding nine calendar months.

5. On or about March 29, 1948, an entry was made in the official log of the vessel by the Master that libellant brought a woman on board the ship, interfered with and pushed the Chief Officer, used abusive language and refused to obey the orders of the Chief Officer, and that libellant was therefore fined four-days' pay ($22.26) for insubordination.

6. On or about March 29, 1948, an entry was made in the official log book of the vessel by the Master that libellant continued wilful disobedience of orders in refusing to come to the Master's quarters; and that libellant was there-

fore put in irons until the disobedience ceased and fined twelve-days' pay ($66.78).

7. The allegations made against libellant in the official log book hereinabove referred to are untrue and without justification.

8. Libellant was not furnished with a copy of such entry, nor was the entry read to him, nor was he given an opportunity to reply thereto, as required by R. S. 4597, 46 U. S. C. A. 702.

9. Libellant was discharged from the service of the vessel on May 31, 1948. At that time, libellant had earned wages in the amount of $750.27, which respondent has wrongfully failed and refused to pay libellant.

SECOND CAUSE OF ACTION.

Libellant re-alleges all of the facts set forth in the first cause of action and, in addition thereto, respectfully represents:

10. Libellant was discharged from the vessel at Philadelphia on May 31, 1948, and will be compelled personally to pay the cost of transportation back to Seattle, Washington, the port of signing on, amounting to $125.00.

11. Libellant has made repeated demands for the wages and transportation costs due him, but the same have been refused by respondent.

12. By reason of the aforesaid, libellant makes further claim for the earned wages due him and for two-days' pay for each day that payment has been withheld without cause, under R. S. Section 4529.

13. During the entire period libellant was employed, he well and truly performed all his duties and was obedient to all lawful commands of the Master and other officers of the said vessel.

14. All and singular, the premises are true and within the admiralty and maritime jurisdiction of the United States and of this Honorable Court.

WHEREFORE, libellant prays that a citation in due form of law according to the rules and practices of this Honorable Court, in a cause of admiralty and maritime jurisdiction may issue against said respondent herein, citing it to appear and answer all and singular the matters aforesaid and that the libellant may have judgment for the amount of his claims aforesaid with interest and costs and such other and further relief as the Court may deem just.

J. TAYLOR BUCKLEY,

FREEDMAN, LANDY AND LORRY,

By /s/ MARTIN J. VIGDERMAN,

Proctors for Libellant.

COMMONWEALTH OF PENNSYLVANIA,
COUTY OF PHILADELPHIA, } *ss.:*

MARTIN J. VIGDERMAN, being duly sworn according to law, deposes and says that he is associated with the firm of Freedman, Landy and Lorry, proctors for the within libellant; that the facts set forth in the foregoing Libel are true and correct to the best of his knowledge, information and belief.

/s/ MARTIN J. VIGDERMAN.

Sworn to and subscribed before me this 26 day of Oct., 1948.

JESSIE D. VALENTI,
Notary Public.

ANSWER.

To the Honorable, the Judges of the Said Court:

The Answer of Isbrandtsen Company, Inc., incorrectly designated in the caption as Isbrandtsen Company, Incorporated, to the Libel and Complaint of Mathew Johnson in an alleged cause of action for wages and statutory penalties, Civil and Maritime, respectfully represents, upon information and belief, as follows:

1. Respondent denies that it has knowledge or information sufficient to form a belief regarding the status of the Libellant at the time of the filing of the within Libel, but admits that Libellant was a seaman on a vessel of United States registry during his service aboard the Steamship "Stephen W. Kearny".

2. Respondent admits the allegations of the second article of the Libel.

3. Respondent denies the allegations of the third article of the Libel and avers, to the contrary, that the Steamship "Stephen W. Kearny" was owned by the United States of America and that said vessel was operated and controlled by the Respondent herein pursuant to the terms of a Bareboat Charter. Respondent further admits that the Steamship "Stephen W. Kearny" was engaged in foreign commerce.

4. Respondent denies the allegations of the fourth article of the Libel as statements of conclusions with reference to the terms of a written contract. It avers that Libellant herein was aboard the Steamship "Stephen W. Kearny" pursuant to the terms of a written contract embodied in the Shipping Articles of said vessel and not otherwise. Said contract is a matter of public record in the Office of the United States Shipping Commissioner and available to Libellant.

5. Respondent denies the allegations of the fifth article of the Libel, but admits that Libellant was logged on the date in question in an amount and for an offense as set forth in the Official Log Book of the vessel. Said Official Log Book of the vessel is in the custody of the United States Shipping Commissioner and available to Libellant.

6. Respondent denies the allegations of the sixth article of the Libel, but admits that Libellant was logged on the date in question in an amount and for an offense as set forth in the Official Log Book of the vessel. Said Official Log Book of the vessel is in the custody of the United States Shipping Commissioner and available to Libellant.

7. Respondent denies the allegations of the seventh article of the Libel.

8. Respondent denies the allegations of the eighth article of the Libel.

9. Respondent denies the allegations of the ninth article of the Libel.

ANSWERING THE SECOND CAUSE OF ACTION, THE RESPONDENT REITERATES AND REALLEGES THE FOREGOING ALLEGATIONS AND DENIALS OF THIS ANSWER AND AVERS, UPON INFORMATION AND RELIEF, AS FOLLOWS:

10. The Respondent denies the averments of the tenth article of the Libel as stated. It admits that the employment of the Libellant on board the Steamship "Stephen W. Kearny" was terminated on or about May 31st, 1948. It denies that it has information sufficient to form a belief as to the remaining averments of the tenth article of the Libel and accordingly denies the same and demands proof thereof.

11. The Respondent denies the allegations of the eleventh article of the Libel as stated. It admits that the Libellant has made demands for wages and other sums

and it admits that it has refused to pay them. It denies that the Libellant is entitled to receive or to demand money from the Respondent either on account of wages, transportation or for any other reason.

12. The Respondent denies that it is required to answer the allegations of the twelfth article of the Libel with respect to the claims made by the Libellant, but the Respondent denies that the Libellant is entitled to recover earned wages or penalties as provided under R.S. 4529.

13. The Respondent denies the allegations of the thirteenth article of the Libel.

14. The Respondent denies that, all and singular, the premises are true and it admits the admiralty and maritime jurisdiction of this Honorable Court.

FURTHER ANSWERING THE LIBEL, AND AS SEPARATE, COMPLETE AND AFFIRMATIVE DEFENSES THERETO AND BY WAY OF A COUNTERCLAIM, THE RESPONDENT AVERS, UPON INFORMATION AND BELIEF, AS FOLLOWS:

15. On or about April 21st, 1948 the Libellant engaged in a personal altercation with one Willis Brandon, Jr. in which the Libellant viciously attacked the said Brandon with a deadly weapon, wounding the said Brandon and necessitating the diversion of the vessel from its course in order to obtain hospitalization for the said Brandon. The Respondent further avers that upon completion of the voyage and arrival of the vessel in Philadelphia, Libellant was arrested by the Police Authorities of the Federal Government and taken into custody by them. The Respondent avers that the Libellant was guilty of insubordination, improper conduct and wilful disobedience during the period of his service on board the Steamship "Stephen W. Kearny". It avers that the license or certificate of the Libellant was revoked by the United States Coast Guard as a result of the said insubordination misconduct and wilful disobedience of lawful orders. It avers that the fines

which were entered in the log as having been deducted from the pay of the Libellant were lawful fines in accordance with the provisions of the applicable statutes, customs and regulations, covering the relationship of the parties.

16. By reason of the assault committed by the Libellant upon Willis Brandon, Jr., as aforesaid, the Respondent diverted its vessel from its course, it incurred expenses in connection with the treatment, hospitalization and transportation of the said Brandon, it incurred losses in connection with the diversion of the vessel and was otherwise damaged in a sum approximating Twenty-Five Hundred Dollars ($2500.00), as near as the sum can now be established. The Respondent avers that a portion of the wages which would have otherwise been due to the Libellant have been lawfully retained by it on account of its said loss and it claims the balance of its said loss from the Libellant.

WHEREFORE, the Respondent prays that the Libel herein filed against it by the Libellant shall be dismissed and prays that it may have judgment against the Libellant upon its counterclaim and that it may have such other and further relief as may seem just to this Honorable Court in the premises.

KRUSEN, EVANS AND SHAW,

By /s/ THOMAS E. BYRNE, JR.,
Proctors for Respondent.

UNITED STATES OF AMERICA,
EASTERN DISTRICT OF PENNSYLVANIA, } *ss.:*
CITY AND COUNTY OF PHILADELPHIA,

THOMAS E. BYRNE, JR., being duly sworn according to law, deposes and says that he is a member of the Bar of the United States District Court for the Eastern District of Pennsylvania; that he is a member of the Firm of Krusen, Evans and Shaw; Proctors for the Respondent in the within cause; that he is authorized and instructed to verify and file the within Answer; and that the facts and allegations thereof are true to the best of his knowledge, information and belief, the source of his information and belief being statements and reports of witnesses.

THOMAS E. BYRNE, JR.

Sworn to and subscribed before me this 18th day of November, A. D. 1948.

/s/ M. V. TOBIN.

STIPULATION.

It is agreed and stipulated by and between the parties that the Libel in the above action be amended by withdrawing therefrom Paragraphs 5, 6, 7 and 8, and by amending Paragraph 9 to read as follows:

> "Libellant was discharged from the service of the vessel on May 31, 1948. At that time Libellant had earned wages in the gross amount of $750.27 and a net amount of wages amounting to $439.27, after proper deductions, which Respondent has failed and refused to pay to Libellant."

It is further agreed and stipulated by and between the parties that the Answer to the Libel in the above action be amended by withdrawing therefrom Paragraphs 5, 6, 7 and 8, and by amending Paragraph 9 to read as follows:

> "Respondent admits that as of April 21, 1948, there had accrued to Libellant wages in the net amount of $439.27, which amount Respondent has refused to pay. Respondent denies that Libellant is entitled to receive or to demand the sum of $439.27 or any part thereof, for reasons which will hereinafter more fully appear. The remaining averments of Paragraph 9 of the Libel are denied."

FREEDMAN, LANDY & LORRY,

By /s/ WILLIAM M. ALPER,
Proctors for Libellant.

KRUSEN, EVANS & SHAW,

By /s/ MARK D. ALSPACH,
Proctors for Respondent.

Dated: January 20, 1950.

STIPULATION OF FACTS.

1. On April 21, 1948 at about 11:50 P. M., the vessel changed course and proceeded to Nuku'alofa, Tonga to obtain medical aid and hospitalization for Brandon for injuries resulting from the stab wound inflicted by Johnson.

2. The expenses incurred and paid by the Respondent as a result of the foregoing incident, set forth in Paragraph 1, are as follows:

(a) For the hospitalization, medical care, repatriation and subsistence for Brandon—	$ 851.44
(b) Expenses for deviation of vessel, pilotage, manifests and harbor dues at Tonga, fuel consumed, food for crew	840.11
Total	$1691.55

3. At the conclusion of the voyage in Philadelphia on or about May 31, 1948, Johnson was removed from the vessel by federal police authorities and was held for indictment and trial under bail, and was confined in prison until June 11, 1948 when he was tried under criminal indictment of four counts arising inter alia, out of the above described incident. The officer on watch knew and the Master was subsequently informed that Johnson was removed from the vessel under arrest as aforesaid.

4. Johnson was not present at the pay-off of the crew on June 3, 1948. On June 11, 1948 Johnson's attorney made demand by telephone call to the main office of the respondent requesting payment of claimed wages which was refused.

5. Respondent refused and has at all times pertinent hereto refused to pay Johnson's claimed wages because it set-off the wages earned by Johnson up to April 21, 1948, against the expenses described in Paragraph 2. No wages

were credited to the libellant by the respondent after April 21, 1948 and no claim is being made by the libellant for wages after April 21, 1948.

6. The present stipulation is entered into for the purposes of this action only and is without prejudice to and cannot be used for or against either party in any other proceeding wherein either party is involved.

FREEDMAN, LANDY AND LORRY,

By /s/ WILLIAM M. ALPER,
Proctors for Libellant.

KRUSEN, EVANS AND SHAW,

By /s/ MARK D. ALSPACH,
Proctors for Respondent.

OPINION

Sur Pleadings and Proof.

Before KIRKPATRICK, *Ch. J.*

In this suit in admiralty the libellant seeks to recover earned wages, double wages under the provisions of R. S. 4529, 46 U. S. C. A. 596, and transportation from Philadelphia to Seattle under the shipping articles. The amount of earned wages is $439.27.

The facts upon which the respondent's affirmative defense and counterclaim are based are fully established by the evidence. I find that while at sea the libellant without justification attacked another member of the crew with a knife and wounded him so severely that it was necessary to divert the vessel from its course in order to get him to a hospital. As a result of the assault and diversion the respondent incurred expenses and losses amounting to $1,691.55. The respondent at the termination of the voyage refused and still refuses to pay the libellant his wages.

It seems perfectly clear that the statute not only does not authorize but forbids the withholding of wages in a situation of this kind. The positive mandate of Sec. 596 that the master of the vessel "shall pay to every seaman his wages" within the times specified admits of no interpretation by which any exceptions, other than those expressly provided by other sections of the statute, can be allowed. The derelictions of the seaman for which his wages may be forfeited are embodied in Sec. 701, which is obviously intended as a complete coverage of the subject of penalties and forfeitures. Causing loss to the vessel's owner by wilfully injuring a fellow seaman is not among them and the phrase "wilfully damaging the vessel" in the 7th paragraph of Sec. 701 cannot be stretched to cover it.

The respondent bases its contention mainly not upon the statute but upon the early rule, announced in several decisions antedating the statute, that such damages as this respondent has suffered may be set off against the claim

for wages. This rule, the respondent says, has not lost its vitality and has survived the statute in the form of a right of equitable recoupment. In the face of the plain provisions of the statute I am unable to accept this view. If it should be held that the equitable right of recoupment still exists, one can see that it could be extended by asserting it in such a variety of cases of misconduct that the abuses that the law was enacted to do away with could easily become prevalent again.

The question whether the two to one penalty of Sec. 596 must be imposed is a much more difficult one. In Collie v. Fergusson, 281 U. S. 52, 56, the Supreme Court stated the general rule as "That the liability is not incurred where the refusal to pay is in some reasonable degree morally justified or where the demand for wages cannot be satisfied either by the owner or his interest in the ship, has been the conclusion reached with practical unanimity by the lower federal courts." It may be that there was and is practical unanimity in the lower federal courts so far as the general principle is concerned but it is almost impossible to reconcile the way in which the courts have applied it to the various fact situations which the cases presented. In the present case the sufficient cause pleaded for the withholding is an apparently honest, though mistaken belief, that it was justified by law. In Burns v. Fred L. Davis Co., 271 Fed. 439, the Court imposed a penalty for withholding wages because of an outstanding attachment issued by a state court. It was so plain that the attachment was illegal and ineffective that the Court said that there was no justification. It almost seems as though the Court felt that the existence of the attachment was merely an excuse or pretext. On the other hand in The City of Montgomery, 210 Fed. 673, the Court held that what turned out to be a misconception of the effect of the shipping articles in the light of their practical construction by the parties supplied a cause for withholding, sufficient to avoid the penalty.

I suppose that even the sense of outrage (which under the circumstances of this case I can well understand) that the respondent may have felt in being met with this libellant's demand for wages would not of itself constitute sufficient cause, though it comes close to making the withholding "in some reasonable degree morally justified" in the language of Mr. Justice Stone in the Collie case, supra. However, this respondent had more than merely a grievance. In Oldfield v. The Arthur P. Fairfield, 176 F. 2d 429, 431, decided, it is true, after the respondent in this case first refused to pay the libellant his wages the Court of Appeals for the 9th Circuit said "We are of opinion the Act, which was passed to mitigate the intolerable conditions of seamen then existing, cannot be construed as an abolition of the amount of equitable right of recoupment by a shipowner from a seaman who has caused loss to the ship by a wilfull violation of the laws of another country." This appears to be at variance with the view reached in this opinion to the effect that the equitable right of recoupment did not survive the statute. True, in the Oldfield case, supra, the Court had a case of smuggling which turned on the very narrow question of whether it was necessary that the seaman be actually convicted of the offense and that, in view of the provisions of Sec. 705, might possibly be a ground of distinction. However that may be, I do not think that the respondent should be penalized for relying upon a principle which a Court of Appeals has recently declared as the law, although in a case involving somewhat different circumstances.

I understand that the respondent does not dispute the fact that the libellant signed on at Seattle and was discharged at Philadelphia. The shipping articles provide that "Standard Fly Award Transportation Applies." The union agreement incorporates that portion of the Fly Award relating to transportation. It liquidates the amount due in case the seaman does not wish to accept transporta-

tion. I think that this figure must be considered an item of wages within the meaning of Sec. 576 and, therefore, what has been said with respect to the respondent's defense to the wage claim applies to the claim for transportation.

My conclusion is that the libellant recover wages, interest, costs and transportation, but not the penalty.

FINAL DECREE.

AND Now, to wit, this 21st day of June, 1950, pursuant to the Opinion filed by this Court on May 19, 1950, it is hereby

ORDERED, ADJUDGED AND DECREED, that judgment be entered for the libellant and against the respondent in the amount of $573.55, with interest at the rate of 6%, from June 3, 1948, and that libellant recover costs.

/s/ KIRKPATRICK,
U. S. D. J.

[fol. 19] INDEX OF APPELLEE'S SUPPLEMENTAL APPENDIX

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(Received & Filed February 5, 1951. Ida O. Creskoff, Clerk.)

[fol. 20] APPELLEE'S SUPPLEMENTAL APPENDIX

Testimony of WALTER R. HERRON.

* * * * * * *

(Page 2) Direct examination.

By Mr. Alspach:

Q. What is your full name, Captain?
A. Walter R. Herron.

* * * * * * *

Q. Captain, were you the master of the steamship "Stephen W. Kearny" on the voyage during April of 1948, during which Wells Brandon was injured?
A. I was.

* * * * * * *

(Page 12) Cross-examination:

* * * * * * *

(Page 14)

By Mr. Alper:

Q. Now, what happened to Johnson when you got to Philadelphia?
A. Well, immediately before arriving in Philadelphia I had sent a radiogram and also a message with the quarantine doctor requesting that the United States Marshal be [fol. 21] down to take him off on arrival.

Q. Did the United States Marshal take him off?

A. I am getting to that. We arrived up here very late in the evening, and nobody showed up that night, and I came ashore the next morning and was getting the papers ready for entry of my ship, and working on the pay-off, and while I was gone the United States Marshal with some other men came aboard and removed Johnson. I didn't see who they were.

Q. Did you know who made the arrangements for the Marshal (P. 15) to come on board?

A. The ship's agent here, I imagine.

Mr. Alspach: Well, if you don't absolutely know, Captain, I would rather you not express any guess.

By Mr. Alper:

Q. You did say you made one request?

A. Yes, I made a request.

Q. When you came in, you asked the quarantine doctor to take a message back?

A. Yes, that message was addressed to Lavino Brothers, the agents here.

Q. To the agents, all right. When you came back to the ship, you were told he had been taken off, is that right?

A. Yes, sir.

[fol. 22] Q. Did you find out what happened to him?

A. I understand he was taken to the Federal Penitentiary here, or Federal Detention, or whatever you call it.

Q. How long did you remain in Philadelphia after that?

A. About a week.

Q. Were you in Philadelphia at the time his case came up for trial?

A. I was.

Q. Did you appear at the trial?

A. I wasn't asked to appear there.

(P. 16)

Q. Well, did you or didn't you appear?

A. No.

Q. Did the ship remain here during that week?

A. Yes, sir.

Q. Were you interviewed by the FBI?

A. I don't recall any interview.

Q. Were you interviewed by the United States Attorney, anyone from the United States Attorney's office about the——

A. Not that I recall.

Q. Did you know where this man was during that week?

A. Only that he was in the Federal Detention Home, or whatever they call it. I knowed he was in a court trial. I know the court trial was on because I released several mem-

[fol. 23] bers of the crew to attend the trial.

Q. When was the pay-off? When did the rest of the crew get paid off?

A. Here in Philadelphia.

Q. How long after you came into port?

A. About 48 hours.

Q. Was the pay-off on the ship?

A. Yes, sir.

Q. And the United States Shipping Commissioner was there?

A. Yes, sir.

Q. Was Johnson there?

(P-17)

A. No.

Q. He was at that time then in custody some place?

A. Yes, sir.

Q. The Federal authorities, is that right?

A. Yes, sir.

Q. Did you have any communication with Isbrandtsen Company before the pay-offs, or with Lavino, whom you say were their agents here, is that right?

A. Well, I was in New York office. I went to New York.

Q. Before the pay-off?

A. Yes, sir.

[fol. 24] Q. Did you have any communication or discussions with Isbrandtsen with regard to whether or not Johnson should be paid?

A. No, sir.

Mr. Alspach: There is an objection to that, Mr. Alper.

The Witness: No, sir, I did not.

By Mr. Alper:

Q. You did not. Did you log Johnson in connection with the stabbing incident in which Wells Brandon was injured?

A. No, sir.

Q. Did you make any entry in the official log with respect to any deduction to be made from his pay arising out of that (P. 18) stabbing incident?

A. No, sir, I did not. I put the case purely up to the future jurisdiction of the United States courts. That is the only entry in the logbook.

Q. At any time up until the time of the pay-off, did you yourself make any decision with regard to whether or not Johnson should be paid, or to what extent he should be paid?

A. I did not, no, sir.

Q. Do you know whether Isbrandtsen made any such decision?

Mr. Alspach: That is objected to.

The Witness: No, sir, I do not.

By Mr. Alper:

Q. Did you compute the expenses incurred by the ship in connection with the diversion of the ship to get medical aid for Brandon?

[fol. 25] A. That is impossible for me to do aboard the ship.

Q. Well, did you or didn't you?

A. No, sir.

Q. You didn't do it. At the time of the pay-off, did you know what that expense was?

A. I know it was quite high. I had no idea, though, exactly how much. I know it was quite high, because that vessel's expense was around $1.10 a mile alone.

* * * * * * *

(P. 20)

Q. You went up to New York before the pay-off, didn't you?

A. Yes, sir.

Q. And the company produced money in Philadelphia to pay the men off the ship, is that right?

A. No, sir, the pay accounts were made up by the paymasters in New York, and then a certified check was sent here and the money was picked up here when I came back with the pay rolls.

Q. And did you go over the pay roll with the paymaster?

A. Yes, sir.

Q. What decision was made at that time with regard to Brandon's pay and Johnson's pay?

[fol. 26] Mr. Alspach: I object to that.

The Witness: So far as I know, their wages (P. 21) were left blank. On neither case was there any lines filled out on them.

By Mr. Alper:

Q. Did you inquire what you should do about that?

A. No, sir.

* * * * * * *

Portion of Cross-Examination of Wells Brandon, Jr., a Witness Called On Behalf of the Respondent

WELLS BRANDON, JR., having been duly sworn was examined and testified as follows:

By Mr. Alper:

Q. Did you ever get your pay for that voyage?

Mr. Alspach: I object to that Your Honor. That is irrelevant to this issue.

The Court: Well, I think it irrelevant. I don't know how it is relevant.

Mr. Alper: All right.

By Mr. Alper:

Q. Did you ever make a claim against the Isbrandtsen Company arising out of this voyage?

[fol. 27] Mr. Alspach: I object to that also Your Honor.

The Court: I will take it subject to the objection.

By The Court:

Q. Did you make any claim against Isbrandtsen as a result of what occurred on this voyage?
A. I did.

By Mr. Alper:

Q. What was the claim for?
A. It was for damages and my wages.
Q. After you filed your claim was that claim settled?
A. No, it wasn't.
Q. Were you ever paid your wages?
A. No, I wasn't.
Q. All right. You came up to Philadelphia voluntarily?
A. Yes.
Q. To testify in this case?
A. Yes.
Q. Were your expenses paid?
A. Just expenses, yes.
Q. Just your expenses?
A. And loss of time for being away.

[fol. 28] National Maritime Union Agreement With Isbrandtsen Company, Inc.—Fly Award On Transportation

"Section 3. Traveling. (a) Members of the Union, when transported by the Company during the course of their employment, shall be provided with first class transportation by rail and with subsistence at the rate of four dollars ($4.00) per day, in addition to their regular monthly wage. When traveling at night is involved, a berth must be provided.

(b) In the event that a vessel terminates a voyage in a port other than the original port of engagement, first class transportation, including berth where necessary, wages and subsistence at $4.00 a day back to the port of original engagement shall be furnished to each member of the Unlicensed Personnel. At the request of the individual crew members, each such member of the Unlicensed Personnel shall be paid in cash the amount equivalent to first class railroad transportation plus twenty percent (20%) thereof. A cash settlement shall not include pullman berth or seat or tax.

The above will apply under the following conditions:

1. After completion of any foreign voyage, except nearby foreign voyages from Atlantic and Gulf Coast ports to [fol. 29] points in the West Indies, Central America, and the northern coast of South America.

2. After completion of a coastwise, intercoastal or nearby foreign voyage as specified above, at the end of sixty (60) days' employment.

3. After termination of the crewmembers' employment in a continental United States port, regardless of type of voyage or length or employment if:

a. The vessel was laid up, sold or transferred.

b. The vessel was shipwrecked or otherwise lost.

c. Employment was terminated for illness or injury requiring hospitalization.

(c.) Port of original engagement shall mean the port in the continental United States where the crew member is first engaged by the Company, regardless of type of articles signed.

(d.) No crew member shall be entitled to transportation if he continues employment on the vessel. (Agreement, August 18, 1948)."

[fol. 30] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,312

MATTHEW JOHNSON, *Appellee*,

vs.

ISBRANDTSEN COMPANY, INC., *Appellant*.

STIPULATION

Subject to the approval of this Court, it is hereby stipulated by and between counsel for the parties that the time within which the Appellant may prepare and file its brief and appendix in the above case may be extended to December 17, 1950.

The reason this extension is requested is that the press of other business including the trial and the preparation

of other cases for trial in the United States District Court has prevented counsel for the Appellant from preparing its brief and appendix.

Krusen, Evans and Shaw, By Mark D. Alspach, Attorneys for Appellant.

Freedman, Landy and Lorry, By William M. Alper, Attorneys for Appellee.

Approved: Maris, C. J.

(Received & filed Nov. 17, 1951; Ida O. Creskoff, Clerk).

[fol. 31] [Stamp:] Received & filed January 2, 1951, Ida O. Creskoff, Clerk.

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,312

MATTHEW JOHNSON, *Appellee*,

vs.

ISBRANDTSEN COMPANY, INC., *Appellant*.

STIPULATION

It is hereby stipulated by and between proctors for the parties that the time within which appellee may file his brief in the above entitled matter shall be extended to and including February 4, 1951, subject to the approval of this Court.

Approved: Biggs Ch. J., Jan. 2, 1951.

Freedman, Landy and Lorry, By William M. Alper, Proctors for Appellee.

Krusen, Evans and Shaw, By Mark D. Alspach, Proctors for Appellant.

[fol. 32] [Endorsed:] In the United States Court of Appeals for the Third Circuit, No. 10,312, Matthew Johnson, Appellee, vs. Isbrandtsen Company, Inc., Appellant. Stipulation. Freedman, Land, & Lorry, 900 Jefferson Building, 1015 Chestnut Street, Philadelphia, Pa.

[fol. 33] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,312

MATTHEW JOHNSON

v.

ISBRANDTSEN COMPANY, INC., Appellant

Stipulation of Counsel to Include Additional Matters in the Record Under Civil Rule 75(h)

And Now, to wit, this 2nd day of February, 1951, it is stipulated and agreed by and between the attorneys for the above-named parties that the following testimony and exhibits, which were offered in evidence at the trial of the case in the United States District Court for the Eastern District of Pennsylvania, and which were omitted from the original record transmitted to this court by reason of the accident and mistake of counsel, be included as part of this record before this court:

[fol. 34] 1. Portion of Cross-Examination of Wells Brandon, Jr.; a Witness Called On Behalf of the Respondent

Wells Brandon, Jr., having been duly sworn was examined and testified as follows:

By Mr. Alper:

Q. Did you ever get your pay for that voyage?

Mr. Alspach: I object to that Your Honor. That is irrelevant to this issue.

The Court: Well, I think it is irrelevant. I don't know how it is relevant.

Mr. Alper: All right.

By Mr. Alper:

Q. Did you ever make a claim against the Isbrandtsen Company arising out of this voyage?

Mr. Alspach: I object to that also Your Honor.

The Court: I will take it subject to the objection.

By the Court:

Q. Did you make any claim against Isbrandtsen as a result of what occurred on this voyage?
A. I did.

[fol. 35] By Mr. Alper:

Q. What was the claim for?
A. If was for damages and my wages.
Q. After you filed your claim was that claim settled?
A. No, it wasn't.
Q. Were you ever paid your wages?
A. No, I wasn't.
Q. All right. You came up to Philadelphia voluntarily?
A. Yes.
Q. To testify in this case?
A. Yes.
Q. Were your expenses paid?
A. Just expenses, yes.
Q. Just your expenses?
A. And loss of time for being away.

2. A Portion of the Agreement Between National Maritime Union and Isbrandtsen Company, Inc., Including That Part of the Fly Award Relating to Transportation, Which Was Read Into the Record as an Exhibit

"Section 3. Traveling. (a) Members of the Union, when transported by the Company during the course [fol. 36] of their employment, shall be provided with first class transportation by rail and with subsistence at the rate of four dollars ($4.00) per day, in addition to their regular monthly wage. When traveling at night is involved, a berth must be provided.

(b) In the event that a vessel terminates a voyage in a port other than the original port of engagement, first class transportation, including berth where necessary, wages and subsistence at $4.00 a day back to the port of original engagement shall be furnished to each member of the Unlicensed Personnel. At the request of the individual crew members, each such member of the Unlicensed Personnel shall be paid in cash the

amount equivalent to first class railroad transportation plus twenty percent (20%) thereof. A cash settlement shall not include pullman berth or seat or tax.

The above will apply under the following conditions:

[fol. 37] 1. After completion of any foreign voyage, except nearby foreign voyages from Atlantic and Gulf Coast ports to points in the West Indies, Central America, and the northern coast of South America.

2. After completion of a coastwise, intercoastal or nearby foreign voyage as specified above, at the end of sixty (60) days' employment.

3. After termination of the crewmember's employment in a continental United States port, regardless of type of voyage or length of employment if:

a. The vessel was laid up, sold or transferred.

b. The vessel was shipwrecked or otherwise lost.

c. Employment was terminated for illness or injury requiring hospitalization.

(c.) Port of original engagement shall mean the port in the continental United States where the crew member is first engaged by the Company, regardless of type of articles signed.

(d.) No crew member shall be entitled to transportation if he continues employment on the vessel.

(Agreement, August 18, 1948)."

[fol. 38] It is further stipulated and agreed that counsel for the appellant do not waive any objection heretofore made to the foregoing at the trial of the case by reason of this stipulation.

Krusen, Evans and Shaw, by Mark D. Alspach, Attorneys for Appellant; Freedman, Landy and Lorry, by William M. Alper, Attorneys for Appellee.

Feb. 9, 1951. Approved. Kalodner, J.

(Received & Filed Feb. 9, 1951. Ida O. Creskoff, Clerk.)

[fol. 39] [Stamp:] Received & filed Feb. 5, 1951. Ida O. Creskoff, Clerk.

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,312

MATTHEW JOHNSON

v.

ISBRANDTSEN COMPANY, INC., Appellant

ORDER

And Now, to wit, this fifth day of February, 1951, upon consideration of the foregoing petition, it is

Ordered that the appellee is granted leave to submit a typewritten brief and appendix.

By the Court: Kalodner, J.

Received & filed Feb. 5, 1951. Ida O. Creskoff, Clerk.

[fol. 40] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,312

MATTHEW JOHNSON

v.

ISBRANDTSEN COMPANY, Appellant

Petition By Appellee For Leave To Typewrite The Briefs and Appendix On Appeal

To The Honorable, The Judges of the Said Court:

The petition of Matthew Johnson, an American merchant seaman, by his proctors, Messrs. Freedman, Landy and Lorry, respectfully represents:

1. That on October 27, 1948, the petitioner commenced an action in Admiralty for the recovery of wages earned while serving as a member of the crew of the S.S. "Stephen

W. Kearny", the respondent's vessel, and a claim under the provisions of R. S. 4529.

2. That your petitioner brought the said action under the provisions of the Maritime Law, and without prepayment of costs under the provisions of the Act of July 1, [fol. 41] 1918, C. 113, Sec. 1, 40 Stat. 683, 23 U.S.C. Sec. 837.

3. That on May 19, 1950, the court below, by the Honorable William H. Kirkpatrick, filed an opinion allowing the recovery of wages, and on June 21, 1950, filed a final decree entering judgment in favor of the libellant.

4. That on September 19, 1950, respondent's Notice of Appeal was filed.

5. That on January 2, 1951, this court approved a stipulation to extend the time for filing appellee's brief to and including February 4, 1951.

6. That your petitioner seeks leave to typewrite the appellee's brief and appendix in this court.

And your petitioner will ever pray, etc.

Freedman, Landy and Lorry, by William M. Alper, Attorneys for Petitioner.

We hereby consent to the allowance of the within petition.

Krusen, Evans and Shaw, by Robert Cox, Attorneys for Respondent-Appellant.

[fol. 42]. [Endorsed:] United States Court of Appeals for the Third Circuit. No. 10,312. Matthew Johnson v. Isbrandtsen Company, Inc., Appellant. Order and Petition by Appellee for Leave to Typewrite the Briefs and Appendix on Appeal. Freedman, Landy and Lorry, 1415 Walnut Street, Philadelphia 2, Pa.

[fol. 43] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10312

MATTHEW JOHNSON

v.

ISBRANDTSEN COMPANY, Appellant

Appeal from the United States District Court for the Eastern District of Pennsylvania

Argued February 19, 1951

Before Biggs, Chief Judge, and Goodrich and McLaughlin, Circuit Judges

OPINION OF THE COURT—Filed August 17, 1951

By BIGGS, Chief Judge.

The libellant, Johnson, employed as a messman on board the S.S. "Kearny", on April 21, 1948, while the vessel was in the Pacific, attacked without justification another member of the crew, Brandon, stabbing him so severely that it was necessary to divert the Kearny from its course to the Island of Tonga in order to hospitalize him. Various issues in the court below have been disposed of by stipulation and the sole question remaining for disposition is whether the respondent, Isbrandtsen, is entitled to set-off or recoup the losses incurred by it by reason of the diversion of the Kearny to Tonga and Brandon's hospitalization [fol. 44] against wages earned by Johnson up to the time of the stabbing. The court below held that there could be no set-off or recoupment and entered an order requiring Isbrandtsen to pay Johnson's wages and his expenses to the port of "signing on". See 91 F. Supp. 872. Isbrandtsen has appealed.

Reliance is placed by Johnson primarily on the provisions of R.S. Sections 4529, 4530 and 4596, 46 U.S.C.A. §§ 596, 597 and 701, though other statutes may be deemed

to be of some aid in determining the intent of Congress.[1] R.S. Section 4529 provides for prompt payment of the seaman upon his discharge and if the master or owner refuses to make the payment within the time prescribed "without sufficient cause" double wages shall be recoverable for each day of delay. R.S. Section 4596 sets up eight offenses which the seaman may commit and prescribes penalties for each of the eight. Johnson contends that it is only when a seaman has committed one of these offenses that justification is afforded the master or shipowner under R.S. Section 4529 to withhold payment of wages. Isbrandtsen takes the contrary position, asserting that under circumstances such as those at bar set-off or recoupment has been allowed. It relies on such decisions as The T. F. Whiton, Fed. Cas. No. 13,849; Macomber v. Thompson, Fed. Cas. No. 8,919; The W. F. Babcock, 2 Cir., 85 F. 978; The Ellen Little, D.C. Mass., 246 F. 151; Oldfield v. The Arthur P. Fairfield, 9 Cir., 176 F. 2d 429; Shilman v. United States, 2 Cir., 164 F. 2d 649; and Chambers v. Moore McCormack Lines, Inc., 3 Cir., 182 F. 2d 747.

We agree with the court below and not with the views expressed by Judge Fee in his able opinion in the Oldfield case. In that case the court found in effect that the right of recoupment had been revitalized by the Shilman decision in the Second Circuit. But Judge Augustus Hand, after a review of the statutory provisions section by section, in-
[fol. 45] cluding those referred to in this opinion, said, "The above sections look toward payment to the seaman by his employer, at the termination of the employment of all his earned wages without any deductions except those which are expressly authorized by statute." The statute to which Judge Hand referred was R. S. Section 4596. The Second Circuit decided the Shilman case on the basis that the crime which the seaman had committed and the fine which was imposed did not fall within the categories specified by R.S. Section 4596, but the Court also lacked proof that the ship had suffered loss thereby. The Court did not permit

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[1] See, for example, R.S. Section 4565, 46 U.S.C.A. § 600, and the Act of March 4, 1915, c. 153, Section 12, 38 Stat. 1169, 46 U.S.C.A. § 601.

a set-off by the shipowner and the Shilman decision seems hardly helpful.

In Eldridge v. Isbrandtsen Co., 89 F. Supp. 718, 720 (decided April 11, 1950), the court below stated, "We feel that the only deductions which may be made from a seaman's wages are those specifically authorized by the Act.", viz., R.S. Section 4596, 46 U.S.C.A. § 701. Contrast this statement, relied on by Johnson here, with that made by us in Chambers v. Moore McCormack Lines, *supra* (decided June 12, 1950), 182 F. 2d at p. 747. We said, "The answer to this argument, viz., that the only deductions which may be made from a seaman's wages are those specifically authorized by R.S. Section 4596, is that R.S. Section 4596 . . . does not list all of the causes sufficient to warrant the withholding of wages." In the Chambers case, however, we were dealing only with the question of penalties and we decided in substance that though a withholding of wages may be for "a sufficient cause", so that the shipowner is not liable for a penalty under R.S. Section 4529, nonetheless, the seaman may be entitled to recover his wages.[2] That decision is not of aid in determining the questions presented by the case at bar.

[fol. 46] We think it unnecessary to discuss here all of the causes sufficient to warrant the withholding of wages. It is clear that Sections 4529 and 4596 must be liberally construed in favor of seamen, wards of the admiralty. See Garrett v. Moore-McCormack Company, 317 U.S. 239, and Waterman Steamship Corporation v. Jones, 318 U.S. 724. A court will be loath to wipe away the benefits conferred by the statutes on seamen as a class because of the criminal conduct of one seaman.

Isbrandtsen contends that Johnson's conduct falls within

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[2] We cited the decision of Mr. Justice Stone in Collie v. Fergusson, 281 U.S. 52, 56, in which it was stated: "That the liability is not incurred where the refusal to pay is in some reasonable degree morally justified, or where the demand for wages cannot be satisfied either by the owner or his interest in the ship, has been the conclusion reached with practical unanimity by the lower federal courts."

the seventh paragraph of R.S. Section 4596[3] but we cannot construe the phrase "damaging the vessel" as the equivalent of doing injury to a member of the crew. We also have given consideration to the proposition that Johnson's conduct might fall within the fourth paragraph of R.S. Section 4596, which prescribes a penalty "For willful disobedience of any lawful command at sea". But we have concluded that paragraph four provides a penalty for disobedience to specific commands and is not intended to relate to the general discipline on shipboard.

We are brought to the conclusion that Johnson can recover. The sixth paragraph of R.S. Section 4596 prescribes punishment "For assaulting any master, mate, pilot, engineer, or staff officer by imprisonment for not more than two years." Congress provided a specific penalty for assault by a seaman on any of the persons designated in the sixth paragraph and that penalty does not include loss of wages. Had Johnson's assault been upon the person of the master of the Kearny nevertheless his wages could not have been withheld. Seamen are not included in the designated group but Congress has legislated in the field of assaults committed by seamen and saw fit to prescribe no penalty for an assault by seaman on seaman. By reason of this fact we do not take the view that such an assault [fol. 47] must result in the loss of wages of the seaman assailant. To so hold would savor of judicial legislation.

Policy suggests the reason why Congress refrained from such legislation. Under the best of conditions many voyages result in tensed nerves and sharpened animosities. Assaults, though usually not of a dangerous character, occur occasionally on shipboard. To hold that because of an assault a master or shipowner may withhold a seaman's wages would emasculate the protective statutes upon which seamen are entitled to rely.

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[3] This paragraph states: "For willfully damaging the vessel, or embezzling or willfully damaging any of the stores or cargo, by forfeiture out of [the seaman's] wages of a sum equal in amount to the loss thereby sustained, and also, at the discretion of the court, by imprisonment for not more than twelve months."

Accordingly the judgment of the court below will be affirmed.

A true Copy. Teste:

_____, Clerk of the United States Court of Appeals for the Third Circuit.

[fol. 48] UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10312

MATTHEW JOHNSON

v.

ISBRANDTSEN COMPANY, INC., Appellant

On Appeal from the United States District Court for the Eastern District of Pennsylvania

Present: Biggs, Chief Judge, and Goodrich and McLaughlin, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs.

Attest:

Ida O. Creskoff, Clerk.

August 17, 1951.

(Received & Filed August 17, 1951. Ida O. Creskoff, Clerk.)

[fol. 49] [Stamp:] Received & Filed Aug. 31, 1951. Ida O. Creskoff, Clerk

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,312

MATTHEW JOHNSON

v.

ISBRANDTSEN COMPANY, INC., Appellant

MOTION FOR EXTENSION OF TIME WITHIN WHICH TO FILE PETITION FOR REHEARING

Krusen, Evans and Shaw, 3100 Lewis Tower Building, Philadelphia 2, Pa., Attorneys for Appellant.

[fol. 50] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,312

MATTHEW JOHNSON

v.

ISBRANDTSEN COMPANY, INC., Appellant

MOTION FOR EXTENSION OF TIME WITHIN WHICH TO FILE PETITION FOR REHEARING

To the Honorable, the Judges of the United States Court of Appeals for the Third Circuit;

The Motion of Isbrandtsen Company, Inc., Appellant, by its attorneys, Krusen, Evans and Shaw, respectfully represents:

1. An Opinion in the within matter was filed by your Honorable Court on August 17, 1951.

2. Appellant is desirous of filing a Petition for Rehearing for consideration by your Honorable Court.

3. The attorneys handling the within matter have been unable to prepare and file said Petition for Rehearing by reason of extended absence from their office immediately [fol. 51] prior to and subsequent to the filing of the within Opinion, which absence has been occasioned primarily by the summer schedule, and to a substantially lesser extent, by illness.

Wherefore, Appellant, Isbrandtsen Company, Inc., prays that your Honorable Court may enter an Order extending the time within which it may prepare and file a Petition for Rehearing to and including September 19, 1951.

Krusen, Evans and Shaw, by Mark D. Alspach, Attorneys for Appellant, Isbrandtsen Company, Inc.

[fol. 52] IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,312

MATTHEW JOHNSON

v.

ISBRANDTSEN COMPANY, INC., Appellant

ORDER EXTENDING TIME FOR FILING PETITION FOR REHEARING

Before Biggs, Goodrich and McLaughlin, JJ.

And now, this 5th day of September, A. D. 1951, upon consideration of the foregoing Motion of the Appellant, Isbrandtsen Company, Inc., for an Order extending the time within which it may file a Petition for Rehearing,

It Is Ordered that the time within which the Appellant, Isbrandtsen Company, Inc., may prepare and file its Petition for Rehearing be and the same is hereby extended to and including September 19, 1951.

For the Court: Biggs, Chief Judge.

(Received & Filed Sept. 5, 1951, Ida O. Creskoff, Clerk.)

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT.

No. 10,312.

MATTHEW JOHNSON

v.

ISBRANDTSEN COMPANY, INC.,

Appellant.

Appeal From the Judgment of the United States District Court for the Eastern District of Pennsylvania.

PETITION FOR REHEARING.

MARK D. ALSPACH,
THOMAS E. BYRNE, JR.,
KRUSEN, EVANS AND SHAW,
Lewis Tower Building,
Philadelphia 2, Pa.,
Attorneys for Appellant.

International, 236 Chestnut St., Phila. 6, Pa.

TABLE OF CASES CITED.

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Glennon v. Lebanon Mfg. Co., 140 Pa. 594	2
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56 Corpus Juris Secundum (Master and Servant) Sec. 77, 79 (pp. 500, 502)	2
Restatement of Agency, Sec. 399 (g), (k); Sect. 456	2
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46 U. S. C. A. 597	4, 5

PETITION FOR REHEARING.

To the Honorable, the Judges of the United States Court of Appeals for the Third Circuit:

The Petition of Isbrandtsen Company, Inc., by its attorneys, Krusen, Evans and Shaw, respectfully requests this Honorable Court to grant a rehearing in the within matter for the reasons to be set out herein.

Upon careful consideration of the Opinion, it is apparent that we have not conveyed adequately, either in our Brief or upon oral argument, the basis for our contention that we are entitled to set off against the wages claimed, the amount of pecuniary loss sustained by reason of libellant's wrongful conduct. We are convinced that further clarification of our position is necessary for complete consideration of the merit of our contention, and is indispensable to a proper determination of the issues involved.

A subsidiary reason for our requesting a rehearing, which in some aspects merges with our initial reason, is that the opinion lays down a rule applicable to shipowners which not only runs counter to the great weight of decided maritime cases, but also ignores well settled principles of law pertaining to the incidents of the master-servant relationship in general. We would like an opportunity to demonstrate this fact.

To clarify our position, we would emphasize preliminarily that in the present controversy we are not appearing in the role of a prosecutor or an aggrieved victim, seeking punishment upon or any penalty from the libellant. All that is sought is an orderly adjudication of the *civil liabilities* of the libellant and the respondent, *inter se*, arising out of the contract of employment. Our sole contention is that when faced with the claim for wages, we are entitled to set off or recoup the amount of liability in damages to us incurred by libellant as the direct result of his

wrongful conduct, his breach of the contract of employment.

The law applicable to the master-servant relationship is controlling on this point, and undoubtedly we have not placed sufficient emphasis upon it heretofore. It is well settled that where a servant, by his wrongful conduct, causes pecuniary loss to his master, the servant is subject to *civil liability* to the master, and that the servant's civil liability may be successfully asserted by the master by way of set-off, counter-claim or recoupment, when the master is faced with an action for wages by the servant. *Restatement of Agency,* Sect. 399 (g), (k); Sect. 456; *Glennon v. Lebanon Mfg. Co.,* 140 Pa. 594; *Rosner v. Globe Valve Corporation,* 83 N. Y. S. (2nd) 496, affd. 87 N. Y. S. (2nd) 524; *Norris v. Cohen,* 27 N. W. (2nd) 277, 223 Minn. 471; *Greenleaf v. Huntingdon & B. T. M. R. & Coal Co.,* 3 F. R. D. 24; *Maratta v. Chas. H. Heer Dry Goods Co.,* 190 Mo. App. 420, 177 S. W. 718; 56 *Corpus Juris Secundum* (Master and Servant) Sect. 77, 79 (pp. 500, 502).

In this state of the law, we submit that the proper inquiry in the case at bar is not whether any decisions or statutes peculiar to the maritime field *grant* the right of set-off or recoupment to the shipowner; rather, the sole problem is to determine whether maritime law sets the shipowner apart, in this respect, from the class of which he is in law a member, and discriminates against him, as a shipowner, to the extent of denying to him the rights commonly enjoyed by his brethren.

The answer to this problem, insofar as the maritime case law is concerned, is clear. We have cited in our Brief numerous cases which not only fail to indicate any reason or authority for limiting the shipowner's right, but actually confirm its existence. We think it inappropriate to dwell upon these cases at any length in this Petition, but we would like to make one observation concerning the opinion in *Shilman v. United States,* 164 F. (2d) 649.

The Opinion in the case at bar (Slip Opinion, page 3) cites the following quotation from the *Shilman* case:

> "The above sections look toward payment to the seaman by his employer, at the termination of the employment of all his earned wages without any deductions except those which are expressly authorized by statute."

We submit that the validity of this expression is necessarily limited by the facts of the *Shilman* case, in which the shipowner did not and could not assert by way of set-off or recoupment any actual pecuniary loss sustained by it as a result of the claimant's conduct. There is nothing in the *Shilman* case to suggest that the quoted language would be applicable, were the facts otherwise, as in the case at bar. Indeed, we submit that in citing many of the authorities which we have cited, and distinguishing the case before it on its facts, the Court in the *Shilman* case gave at least tacit recognition to the validity of the cited cases.

Before dismissing the *Shilman* case, we would invite attention to the fact that the Respondent in the case at bar is not attempting to make any "deduction" from Libellant's wages. Rather, it is our contention that we are entitled to assert contemporaneously with Libellant's claim for wages, our claim for pecuniary damages sustained arising out of the same relationship which gave rise to Libellant's claim. Strictly speaking, this is no more a "deduction" from the Libellant's wages than is any of a number of types of set-offs, counter-claims, etc., which have frequently been allowed to civil litigants in a host of other familiar situations.

We respectfully submit that the provisions of R. S. § 4596, referred to in the Opinion (Slip Opinion, Page 4), are neither relevant nor controlling in the case at bar. We are fearful lest we have conveyed, either in our Brief or upon oral argument, the impression that we relied upon R. S. § 4596, or that this legislation has any decisive bear-

ing on the issues involved. We did not intend to do so. On the contrary, we contend that R. S. § 4596 is penal in nature, and as such is irrelevant to a determination of this case. In our Brief (Page 8) we attempted to demonstrate that R. S. § 4596 is penal in nature, and no additional purpose would be served by repeating that argument here. Nor, for that matter, does the Opinion reveal to us any disagreement with our contention as to the nature of R. S. § 4596; rather, it persists in treating the main problem in the case as one of discipline, rather than of who owes whom how much, in which latter category, we respectfully submit, it properly belongs.

In the last four lines on page 4 of the slip copy of this Court's Opinion, it is clearly implied, if not held, that unless an Act of Congress specifically provides a crime as applicable to seamen when on the high seas, there is no penalty and *a fortiori* no crime. Thus it follows logically that none of the Common Law crimes are applicable to seamen; in fact, this Court says "Congress has legislated in the field of assaults committed by seamen and saw fit to prescribe no penalty for an assault by seaman on seaman".

Thus a seaman can commit no common law crime, certainly none against his employer. It follows, then, that if Matthew Johnson had committed a common law crime against his employer, no penalty would attach and the employer would be powerless to make himself whole.

Let us illustrate. By false pretenses, as for example, falsifying the ship's payroll records or the number of hours worked by him, Matthew Johnson made it appear upon the payroll records of the ship that $500.00 had been earned by him at the time the vessel stopped at an intermediate port. In fact he had earned but $200.00.

Pursuant to 46 U. S. C. A. 597, he was entitled to receive on demand one-half of "his wages earned". Johnson points to the false payroll record and demands $250.00 and, as he must, the Master delivers that amount to him.

Later and before the vessel completes its voyage, the false pretenses committed by Johnson are discovered. When the vessel reaches the end of its voyage the true amount of wages earned by Johnson is $500.00. The shipowner deducts the $250.00 paid at the intermediate port and pays Johnson $250.00. Johnson claims that only $100.00 was properly advanced to him at the intermediate port and points to the provisions of 46 U. S. C. A. 597. He therefore demands the additional $150.00 and when it is not paid he commences suit for it. If this Court's Opinion in the present case is correct, then Johnson would be entitled to recover that $150.00 additional because there is no statutory authorization for deducting more than one-half of "Wages Earned" at the intermediate port. If this Court's Opinion is correct Johnson has committed no crime, no "penalty" can attach to him and his employer is powerless to protect himself from the effects of Johnson's act which would have been a crime at common law.

We respectfully suggest that in its Opinion this Court strays from logic when it regards the present case as one involving a penalty. It is not a penalty but a case of equitable recoupment or set-off in which an employer invokes the ancient right to claim against his employee for a loss caused the employer by the act of the employee. Yet this Court says that to compel a man to pay what he owes and invoke this equitable right of recoupment is to inflict a "penalty".

This is not a case where anyone is attempting to "wipe away the benefits conferred by the statutes on seamen as a class because of the criminal conduct of one seaman" (Slip Opinion, page 4, first paragraph). We suggest that it is not inflicting a penalty to seek to recover that which is owed. By its decision this Court has wiped out the rule of equitable recoupment or set-off as between seaman and employer and gives as its reason the fact that Congress has failed to legislate on the subject. Civil rights are not normally governed by penal statutes and we cannot think that Congress intended to repeal a well understood rule of

civil liability when it enacted a statute dealing with "offenses and penalties". That would attribute to Congress the intention that a "protective statute" was intended to become an offensive weapon in the hands of a seaman whose criminal conduct had caused loss to his employer.

In closing, we would like to dwell for a moment upon the considerations of policy underlying the present decision. We submit that this Honorable Court need have no fear of wiping away the benefits conferred by the statutes on seamen so long as the "penalty" statute (R.S. § 4529, 46 U. S. C. A. § 596) protects them, as a class, from arbitrary or capricious withholding of wages. Confining ourselves to the considerations of policy presented by the facts of the case at bar, we seriously doubt that Congress could ever have intended to protect or condone the conduct of one such as the Libellant when it enacted the "protective statutes" referred to in the Opinion (Slip Opinion, Page 5). Nor, we submit, can the classification of seamen as wards of the admiralty realistically be considered the touchstone to produce, or assist in producing, the result here attained. We seriously doubt that Mr. Justice Story, when he so classified seamen more than a century ago, could have been prompted by considerations of solicitude for one in Libellant's category.

CONCLUSION.

For the reasons set out in the foregoing Petition, we respectfully request this Honorable Court to grant a rehearing to the Respondent-Appellant in the within matter.

Respectfully submitted,

MARK D. ALSPACH,
THOMAS E. BYRNE, JR.,
KRUSEN, EVANS AND SHAW,
Attorneys for Respondent-Appellant, Isbrandtsen Company, Inc.

I hereby certify that the within Petition is filed in good faith and not for the purpose of delay but is, in my opinion, well founded in law and fact and proper to be filed herein.

MARK D. ALSPACH.

[fol. 54] [Stamp:] Received and filed September 27, 1951, Ida O. Creskoff, Clerk.

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 10,312

MATTHEW JOHNSON

v.

ISBRANDTSEN COMPANY, INC., APPELLANT

Sur Petition for Rehearing

Present: Biggs, Chief Judge, and Goodrich and McLaughlin, Circuit Judges

And now, to wit September 27, 1951 after due consideration, the petition for rehearing in the above-entitled case is hereby denied.

Philadelphia, September 27, 1951.

Biggs, Chief Judge.

Endorsements: Order Denying Petition for Rehearing.

[fol. 55] UNITED STATES OF AMERICA, ss:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable, the Judges of the United States District Court for the Eastern District of Pennsylvania.

GREETING:

Whereas, lately in the United States District Court for the Eastern District of Pennsylvania, before you or some of you, in a cause between Matthew Johnson, Libellant (Appellee) and Isbrandtsen Company, Inc., Respondent, (Appellant)—No. 367 of 1948 In Admiralty—a Decree was entered in the District Court on June 21, 1950, which Decree is of record in the office of the clerk of the said District Court, to which reference is hereby made, and the same

is hereby expressly made a part hereof, as by the inspection of the record of the said District Court, which was brought into the United States Court of Appeals for the Third Circuit by virtue of an appeal by Isbrandtsen Company, Inc., agreeably to the Act of Congress, in such case made and provided, more fully and at large appears.

And whereas, the said cause came on to be heard before the said United States Court of Appeals for the Third Circuit, on the said record, and was argued by counsel;

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed, with costs, and that the Appellee, Matthew Johnson recover against the Appellant, Isbrandtsen Company, Incorporated in the sum of Twenty and 00/100 Dollars ($20.00) [fol. 56] for costs herein expended and have execution therefor.

August 17, 1951.

You, therefore, are hereby commanded that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Signed and sealed this 3rd day of October in the year of our Lord one thousand nine hundred and fifty-one.

Ida O. Creskoff, Clerk, United States Court of Appeals for the Third Circuit.

Costs—Proctor's Fee, $20.00; total, $20.00.

[Endorsed:] No. 367 of 1948 In Admiralty, No. 10,312, Matthew Johnson vs. Isbrandtsen Company, Inc., Appellant. Copy, Mandate Received and Filed October 3, 1951, Ida O. Creskoff, Clerk.

[fol. 57] I, Ida O. Creskoff, Clerk of the United States Courts of Appeals for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original Appellant's Appendix, Appellee's Supplemental Appendix, and proceedings in this court in the case of Matthew Johnson vs. Isbrandtsen Company, Inc., Appellant, No. 10,312,

on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 7th day of December in the year of our Lord one thousand nine hundred and fifty-one, and of the Independence of the United States the one hundred and seventy-sixth.

Ida O. Creskoff, Clerk of the U. S. Court of Appeals, Third Circuit. (Seal.)

[fol. 58] SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1951

No. 493

[Title omitted]

ORDER ALLOWING CERTIORARI—Filed March 3, 1952

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.